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Indiana Law Journal

Volume 51 | Issue 3

Article 15

Spring 1976

# Indiana City Attorneys: A Conflict of Interests

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## Recommended Citation

McKee, Christina (1976) "Indiana City Attorneys: A Conflict of Interests," *Indiana Law Journal*: Vol. 51 : Iss. 3 , Article 15.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol51/iss3/15>

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## Indiana City Attorneys: A Conflict of Interests

He shall have the management, charge, and control of the law business of said city and for each branch of its government.<sup>1</sup>

This broad statutory charge to the Indiana city attorney evolved in an era when the activities of municipal government were, in comparison to the varied and pervasive municipal programs of today,<sup>2</sup> fairly circumscribed. Today's city is an increasingly complex entity with a growing potential for friction between the segments of municipal government.<sup>3</sup> As legal counsel for the city and for each branch of its government, the Indiana city attorney must recognize and deal with the potential conflicts of interest<sup>4</sup> inherent in his position.

This note looks first at conflicts growing out of the interplay between the broad statutory command of the city attorney and the "strong mayor" form of municipal government which exists in Indiana. It sug-

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<sup>1</sup>IND. CODE § 18-1-6-13 (Burns 1974).

<sup>2</sup>Indiana has by implication adopted Cooley's classic definition of the municipal corporation as

a perfect public corporation, established under and by virtue of a sovereign act of legislation, uniting the people and land within a prescribed boundary into a body corporate and politic for the purposes of local and self-government, and invested with the powers necessary therefor.

R. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS §§ 6 & 7 (1914). See *State v. Brubeck*, 204 Ind. 1, 5, 170 N.E. 81, 82 (1932) (establishing that the state is not a municipal corporation). This legal definition tells the city attorney what kind of an entity he represents, and it may suggest to him the possibilities of city government, but it does not answer the question of how these possibilities have been realized.

<sup>3</sup>The city's increased responsibility for the quality of life, and the effect of this responsibility on the city, have been recognized by urban experts for at least 40 years. See A. BROMAGE, INTRODUCTION TO MUNICIPAL GOVERNMENT AND ADMINISTRATION 44-54, 555 (1957); C. KNEIER, CITY GOVERNMENT IN THE UNITED STATES 20-25 (1934). The discussion continues today. See Alford, *The Bureaucratization of Urban Government*, in SOCIAL CHANGE AND URBAN POLITICS: READINGS 262 (D. Gordon ed. 1973); Banovetz, *The City: Forces of Change*, in MANAGING THE MODERN CITY 24-27 (J. Banovetz ed. 1971).

For a look at the role of the legal department in urban government, see BROMAGE, *supra*, at 555; Kennedy, in MANAGING THE MODERN CITY, *supra*, at 403-06; 3 E. McQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 12.51 (3d rev. ed. 1973); W. WINTER, THE URBAN POLITY 131-34 (1969).

<sup>4</sup>The note will not discuss conflicts which arise as a result of the practice of permitting attorneys to engage in private practice while acting as city attorney.

Indiana is not unique in its use of part-time city attorneys. Probably most American cities under 50,000 in population employ part-time legal counsel. See Kennedy, *Legal Services and Regulatory Procedures*, in MANAGING THE MODERN CITY 403 (J. Banovetz ed. 1971). One author has suggested that the practice of hiring several part-time attorneys instead of a single full-time attorney is one of the reasons for what he considers the "inadequacy" of legal talent currently available to cities. W. WINTER, THE URBAN POLITY 131-34 (1969). This note suggests, however, that employment of one attorney to represent all segments of government causes problems not considered by Winter.

gests the need for a redefinition of the role of the city attorney, based on a forthright recognition that he must in practice act as the legal arm of the *executive* branch of municipal government. This note will then analyze the ethical problems<sup>5</sup> posed by the city attorney's position and suggest a possible reinterpretation of the Code of Professional Ethics.

### THE IMPACT OF THE STRUCTURE OF MUNICIPAL GOVERNMENT

By adopting a "strong mayor" form of municipal government, Indiana has made its mayors both the titular and effective leaders of its cities. The Indiana mayor in cities of all classes possesses the following powers: (1) power to appoint and remove upper-level administrative personnel; (2) power to veto the actions of the legislative branch of the city; and (3) power to supervise, prepare, and submit the city budget.<sup>6</sup> These are the signs of a "strong mayor" government.<sup>7</sup> More-

<sup>5</sup>Lawyers and their ethical problems in general have been the topic of much recent concern. See, e.g., Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK L. REV. 66 (1974); Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. BAR. J. 331 (1974); Flynn, Webster & Swartz, *Legal Ethics and Professional Responsibility in California*, 7 SW. L. REV. 603 (1975); Hood, *Renewed Emphasis on Professional Responsibility*, 35 LA. L. REV. 719 (1975); Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1541 (1974); Symposium, *The Law, the Bar and Public Virtue*, 55 CHI. BAR REC. 1 (Spec. Centennial Issue 1974); Symposium, *Law, Lawyers and Ethics: A Challenge to the Profession*, 23 DE PAUL L. REV. 633 (1974); Symposium, *Legal Ethics*, 48 L.A. BAR J. 403 (1973); Symposium, *Legal Ethics*, 12 SAN DIEGO L. REV. 245 (1975); Teschner, *Lawyer Morality*, 38 GEO. WASH. L. REV. 789 (1970); Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155 (1966); Wright, *The Code of Professional Responsibility*, 14 ST. LOUIS L.J. 643 (1970); Note, *Disciplinary Enforcement Problems and Recommendations: An Indiana Survey*, 48 IND. L.J. 134 (1970); Comment, *Ethics: Ethical Standards as Test of Evidence Admissibility*, 13 WASHBURN L.J. 148 (1974); 16 B.C. IND. & COMM. L. REV. 651 (1975).

<sup>6</sup>IND. CODE §18-1-6-2 (Burns 1974).

Mayor—Powers and duties.—It shall be the duty of the mayor:

First. To cause the ordinances of the city and the laws of the state to be executed and enforced.

Second. To communicate to the council at least once a year a statement of the finances and general conditions of the city, and also such information in relation to city affairs as he may be called upon to furnish from time to time.

Third. To make such recommendations in writing, by message to the council, as he may deem expedient.

Fourth. To call special meetings of the council when the same shall be expedient.

Fifth. To perform such duties of an executive or administrative character as may be prescribed by law; and to exercise general supervision over subordinate officers and be responsible for the good order and efficient government of the city.

Sixth. To fill by appointment vacancies for unexpired terms in the offices of such city, except in case of vacancy in the office of mayor or councilman, as in this act [18-1-1-1—18-1-24-1] hereinbefore provided.

Seventh. To appoint the heads of departments, as hereinbefore created, in cities of the first, second, third and fourth classes, and to appoint, in cities of the fifth class, a city marshal, chief of the fire force and street commissioner, all of which appointees shall hold office until their successors are appointed and

over, the mayor is required to "exercise general supervision over subordinate officers and be responsible for the good order and efficient government of the city."<sup>8</sup> Indiana's statutory scheme thus grants the mayor wide-ranging authority with which to develop and implement policy decisions,<sup>9</sup> and to run city government.

Because of the dominant role which the mayor plays in guiding and implementing policy and in administering the day-to-day affairs of municipal government, it is essential that the mayor have a close working relationship with the city attorney.<sup>10</sup> Nearly all of the duties of the city attorney, including representation of the city in all appeals,

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qualified; and he shall make such other appointments as may be provided by law or by the ordinances of any city: Provided, That the mayor may, at any time, suspend or remove from office any or all of such heads of departments or other persons, whether appointed by him or by any of his predecessors . . . .

Ninth. To approve or disapprove, in writing, within ten [10] days after receiving the same, every ordinance or resolution of the common council, and he shall transmit to such council within such time, a message, announcing such approval or veto. In case of a veto, he shall state in writing his reason therefor, and such resolution or ordinance shall not become operative unless the same is passed over such veto by a two-thirds [ $\frac{2}{3}$ ] vote of the common council: Provided, That in ordinances appropriating money or levying a tax or taxes, the mayor may approve or disapprove the separate items of such appropriation or levy. In case of disapproval of any item or items, and approval of the remainder of the ordinance, so much of the same as is approved shall be law and operative, and those items which are disapproved shall not become law and operative unless passed over by a two-thirds [ $\frac{2}{3}$ ] vote as before provided.

Tenth. To call together the heads of departments provided for in this act, except that of assessment and collection of taxes, for consultation and advice upon the affairs of the city at least once a month, and to call on the heads of all departments for reports, which it shall be their duty to submit in writing. Records shall be kept of such meetings, and rules and regulations shall be adopted thereat for the administration of the affairs of the city departments, not inconsistent with any law or ordinance; and rules and regulations shall be adopted at such meetings which shall prescribe a common and systematic method of ascertaining the comparative fitness of applicants for office, position and promotion, and of selecting, appointing and promoting those found to be best fitted.

*Id.*

<sup>7</sup>For discussion of the "strong mayor" model of municipal government, see generally J. BAKER, *URBAN POLITICS IN AMERICA* 176-78 (1971); A. BROMAGE, *INTRODUCTION TO MUNICIPAL GOVERNMENT AND ADMINISTRATION* 273-77 (1957); 3 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 12.43 (3d rev. ed. 1973); W. WINTER, *THE URBAN POLITY* 235-39, 280-81 (1969).

<sup>8</sup>IND. CODE § 18-1-6-2 (Burns 1974).

<sup>9</sup>The development of "strong mayor" government came in answer to an earlier model of mayor-council government which concentrated power in the hands of the council. While publicly acknowledged as the head of city government, the weak mayor found himself unable to control the government he was supposed to be leading. There was no central authority, and bossism was too frequently the answer to the power vacuum at the top. J. BAKER, *URBAN POLITICS IN AMERICA* 173-75 (1971). See A. BROMAGE, *INTRODUCTION TO MUNICIPAL GOVERNMENT AND ADMINISTRATION* 260-64 (1957).

<sup>10</sup>This note does not propose that the city attorney represent the mayor *himself*, in opposition to the attorney's duty to represent the city as represented by the mayor. Reference to the mayor is, of course, made to his official capacity as chief executive of the municipality.

prosecution of ordinance violations, drafting of legal documents, and advising the mayor and the city's departments,<sup>11</sup> are performed in furtherance of the executive function. In fact, the close relationship between the mayor and the city attorney is formalized in the structure of municipal government, which places the legal department within the executive branch.<sup>12</sup> The mayor is thus allowed to choose his legal advisor and to determine his tenure.<sup>13</sup>

However, the statute creating the position of city attorney directs the attorney to advise *all* branches and departments of the city's government.<sup>14</sup> The city attorney is thus statutorily-required to advise not only the mayor but also the common council. This situation presents the city attorney with a clear conflict—it is inevitable that the mayor and city council will clash over issues on which the attorney will have been asked to advise both entities.<sup>15</sup>

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<sup>11</sup>IND. CODE § 18-1-6-13 (Burns 1974).

Department of law—City attorney—Appointment and bond—Powers and duties—Assistants—Judgments against city, how enforced.—The head of the department of law in every city shall be the attorney and counsel of such city. He shall be appointed by the mayor . . . .

He shall have the management, charge and control of the law business of such city and for each branch of its government, shall prosecute all violators of city ordinances, shall be the legal advisor of all its departments and officers, shall draw up ordinance, leases, deeds, contracts or other legal papers for such city and its various departments, when requested to do so by the proper officer, shall be the custodian of the papers properly appertaining to his office, and shall turn the same over to his successor in office. He shall conduct all legal proceedings authorized by this act, and all appeals of every nature whatsoever in which such city or the public shall have an interest, shall make all searches and examine all abstracts of title required in opening, widening or changing any street, alley or public place, or required in any public work of any kind. . . .

*Id.*

<sup>12</sup>IND. CODE § 18-1-6-4 (Burns 1974).

The following executive departments are hereby established in cities of the first, second, third and fourth classes:

- a. Department of finance.
- b. Department of law.
- c. Department of public works.
- d. Department of public safety.
- e. Department of assessment and collection.
- f. Department of public health and charities.

*Id.*

<sup>13</sup>The mayor has the power to appoint the city attorney in each of the five classes of Indiana cities. See IND. CODE §§ 18-2-1-4.2(a); 18-2-1-4.4; 18-2-1-5; 18-2-1-6; 18-4-7-5 (Burns 1974). The power to dismiss is given the mayor by IND. CODE § 18-1-6-2 (Burns 1974).

See generally 2A C.J. ANTIAEU, LOCAL GOVERNMENT LAW: MUNICIPAL GOVERNMENT LAW § 22.22 (1974); 4 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.12 (3d rev. ed. 1973).

<sup>14</sup>See IND. CODE § 18-1-6-13 (Burns 1974).

<sup>15</sup>See State *ex rel.* Cleveland City Council v. Cuyahoga County Bd. of Elections, 40 Ohio App. 2d 299, 318 N.E.2d 889 (1974).

The statute which places the city attorney in the role of advisor to all<sup>16</sup> gives him no guidance as to whom he owes his primary allegiance. While it is possible that he might attempt to represent a self-generated conception of the "city," the "strong mayor" form of municipal government in Indiana, particularly as evidenced by the mayor's power of appointment, would seem to assure that the city attorney will ultimately advocate the policies of the mayor and the executive branch.<sup>17</sup>

Such an eventuality is suggested by the opinions of practicing city attorneys.<sup>18</sup> Although one thought that "as city attorney you must look

<sup>16</sup>This role is a common one for city attorneys. See Kennedy, *Legal Services and Regulatory Procedures*, in *MANAGING THE MODERN CITY* 403 (J. Banovetz ed. 1971):

Under statutes and charters, the attorney is the legal advisor to the municipality. As such, one of his most important functions, if not the most important, is that of serving as advisor to the council, the administration, to boards and commissions, and, indirectly, to the citizens of the municipality. . . . This advisory function is exercised in both formal and informal ways, and when properly utilized, permeates the entire governmental structure.

*Id.* at 405-06.

<sup>17</sup>See Fed. Bar Assoc. Ethics Comm., *The Government Client and Confidentiality: Opinion 73-1*, 32 FED. BAR J. 71 (1973):

The more usual situation of the federally employed lawyer, however, is that of the lawyer who is a principal legal officer of a department, agency or other legal entity of the Government, or a member of the legal staff of the department, agency, or entity. This lawyer assumes a public trust, for the government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. In pointing out that the federally employed lawyer thus is engaged professionally in the furtherance of a particular governmental responsibility we do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part. Proceeding upon the foregoing background, the client of the federally employed lawyer, using the term in the sense of where lies his immediate professional obligation and responsibility, is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business.

*Id.* at 72 (footnotes omitted).

<sup>18</sup>The following questions were mailed to 52 Indiana city attorneys in preparation for this note. Fifty-eight percent of the attorneys responded [survey on file with the *INDIANA LAW JOURNAL*]. The author acknowledges their cooperation with gratitude.

1. Is the position of city attorney a full-time position?
2. If not, how many hours a week do you spend on city matters?
3. Do you have a private practice in addition to your work for the city?
4. Does the city attorney have any assistant attorneys assigned to him/her?
5. Are there other attorneys employed by the city to work with specific agencies or boards in your city?
6. If so, how many, and with which groups do they work?
7. Do you see the role of city attorney to be primarily that of a mediator? an advisor? an advocate? Why?
8. Is the position of city attorney considered in your city to be that of a spokesman for the city's administrative branch?

out for the city as a whole,"<sup>19</sup> another attorney, discussing a conflict between a city board and the city administration, acknowledged reality with this comment: "Should this matter continue, the board will have to hire its own attorney to sue the city. This staff cannot possibly sue the administration it represents."<sup>20</sup> A third attorney summed up the situation, stating that: "[S]ince the city attorney is appointed by the mayor and serves at his discretion, he must represent the city's interest as represented by the mayor and the Board of Public Works and Safety."<sup>21</sup> Clearly, this problem of self-perception is a factor which cannot be ignored in formulating the city attorney's proper role.

In light of the conflicts inherent in the duties of the city attorney, the Indiana General Assembly appears to have taken the initiative in recasting his role. The legislature, in a relatively recent enactment, empowered the common council to hire "one or more competent attorneys . . . on terms which the common council may deem appropriate" in order to furnish "legal assistance for common councils."<sup>22</sup> This grant

9. Have you ever been involved in litigation between a city board or commission and the city?
10. If yes, what were the circumstances? Which party did you represent? By whom was the other party represented? How did you choose which party to represent?
11. If no, are you aware of such litigation involving others? Please describe any such situation.
12. If you have not been involved in such litigation, have you seen situations in which it might have occurred? Please describe them.
13. If yes, how did you avoid those situations?

<sup>19</sup>Response to survey, *id.*

The concept of public service was frequently mentioned by the attorneys. Several indicated to the author that they regard the work they do as city attorneys to be in fulfillment of the attorney's obligation to use his special skills for the public good. Certainly, as one lawyer pointed out, the financial compensation received is not sufficient to explain the hours devoted to the work.

<sup>20</sup>*Id.* See generally Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155 (1966).

<sup>21</sup>Response to survey, *supra* note 18.

Several attorneys pointed out that the city attorney's position as a member of the Board of Public Works and Safety automatically classifies him as an administration spokesman. So the attorney identified as the representative of all the city has been, in reality, assigned to one segment.

<sup>22</sup>IND. CODE § 18-2-3.5-1 (Burns 1974).

Legal assistance for common councils authorized.—The common council of any city is hereby empowered to hire or contract with, or on a full-time or part-time basis, one or more competent attorneys and/or legal research assistants on terms which the common council may deem appropriate.

(a) The provisions of this chapter [18-2-3.5-1] shall not apply to any cities in which the common councils are required by law to select the city attorney.

(b) The appointment of an attorney pursuant to this section shall in no way eliminate the office or duties of city attorney as may now or hereafter be provided for by any law of this state.

(c) The appropriation for the payment of the salaries of such attorneys and/or legal research assistants as may be employed by the common council may

of authority may indicate a legislative awareness of the difficulties of the city attorney's position and the resulting need for independent legal advice for the common council.

Unfortunately, the legislature clouded the relationship and division of responsibilities between the two attorneys (city attorney and common council attorney) by adding to the same statute a qualifying section which states that "[t]he appointment of an attorney pursuant to this section shall in no way eliminate the office or duties of city attorney. . . ."<sup>23</sup> This clause, when read together with the statute which creates the office of city attorney and grants to that position a seemingly exhaustive set of legal duties (including the duty to advise *all* departments and officers of the city),<sup>24</sup> could be interpreted to mean that the city attorney retains his responsibility for rendering legal advice to the common council despite the council's statutory power to hire its own attorney. This interpretation, however, produces an undesirable duplication of functions, a duplication which the legislature presumably would not sanction at the municipal level.<sup>25</sup>

The problem of duplication of functions could be avoided, on the other hand, by a literal and restrictive reading of the statutes. Such a reading would emphasize the city attorney's hegemony in the "law business" of the city, and would make him ultimately responsible for advising the common council. The attorney for the common council would be relegated to the task of offering advice supplementary to that given by the city attorney. It seems highly unlikely that the legislature would have adopted such a circuitous method for supplementing the resources of the city attorney,<sup>26</sup> when it could simply have empowered him to hire additional staff attorneys as needed.

On balance, the most satisfactory interpretation of this recent statute is that its primary purpose was to allow the common council to appoint its own attorney on its own terms, thereby eliminating the influence of the mayor and obtaining for itself the benefit of independent legal advice. The statute supports this conclusion, since it denies the common council the power to appoint its own attorney in those situ-

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not exceed that which is appropriated for similar salaries in the budget of the city attorney.

*Id.*

<sup>23</sup>IND. CODE § 18-2-3.5-1(b) (Burns 1974) (emphasis added).

<sup>24</sup>See IND. CODE § 18-1-6-13 (Burns 1974).

<sup>25</sup>See 1970 IND. ATT'Y GEN. ANN. REP. 91.

<sup>26</sup>To give to the city council the authority to ensure that the city attorney's staff is adequate to meet the council's needs would invite inefficiencies, since the city attorney is in the best position to know the needs of his office. The redundancy which might result would be contrary to the public policy of Indiana. See *id.*



ations in which the common council is required to itself select the city attorney<sup>27</sup>—situations in which the mayor's influence over the city attorney would be far less than in the typical case in which the mayor selects the city attorney.<sup>28</sup>

Any possible conflict between this interpretation and the requirement that the appointment of the common council's attorney "shall in no way eliminate the . . . duties of [the] city attorney. . . ."<sup>29</sup> may be resolved by viewing this stipulation as merely a savings clause. The legislative intent to provide independent counsel for the common council is clear from the caption and body of that section of the statute;<sup>30</sup> the addition of the clause discussed above is in keeping with legislative apprehension of conflicting legislation, and could easily have been appended without consideration for the possible interplay of the statutory provisions.

Interpreted in this manner, the statute evinces a legislative awareness of political reality, and a recognition that the Indiana city attorney acts and should act as the legal arm of the mayor<sup>31</sup> and the executive

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<sup>27</sup>See IND. CODE § 18-2-3.5-1(a) (Burns 1974).

<sup>28</sup>See note 6 *supra* & text accompanying.

<sup>29</sup>IND. CODE § 18-2-3.5-1(b) (Burns 1974).

<sup>30</sup>See note 22 *supra*.

<sup>31</sup>This close identification of the attorney with the mayor is not without problems. There is in every attorney-client relationship the difficulty of maintaining the proper balance in the attorney's service to the client. The attorney is hired to advise the client of the best legal means for reaching the client's goals, and in doing so the attorney becomes, to some extent, an extension of the client. The other aspect of the attorney's service is the application to the problem at hand of his independent legal judgment. He must retain some distance between himself and the client so that he can bring that judgment to bear. The difficulty, then, becomes knowing which aspect of the attorney's role must take precedence in a given situation.

Suppose, for example, that the mayor seeks the city attorney's legal advice before undertaking some course of action. The attorney finds that the mayor's proposed plan is legally correct. He does not, however, believe it to be a wise plan. The attorney's response in this situation should be to support the mayor's proposal, and to design the best legal method of accomplishing this goal. The city attorney's responsibility in this situation is not to formulate policy but rather to implement the desires of the administration he represents. If he has in good conscience decided that these goals are legally legitimate, then he should concentrate his energies on providing the legal tools to accomplish them. There is no conflict of interest present here.

The situation is much different, however, if the attorney finds the course of action advocated by the mayor to be legally impermissible. This situation presents a more complicated problem for the city attorney. He can no longer consider himself an extension of the client; the introduction of the plan's illegality adds a new dimension. The attorney must now concentrate upon his own personal and ethical responsibilities. There is a point at which the attorney should decide that his "duty" to his client cannot override his own ethical obligation not to support an illegal course of action. He can divorce himself personally from the mayor's actions and support those actions when his disagreement is only with the policy decisions involved, but he cannot so divorce himself when his support of the mayor would require him to violate his own ethical code.

Faced with this conflict of interests, the attorney will have to abandon his accustomed role as representative of the mayor and administration. This is the point at which the

branch of municipal government. The adoption of this interpretation as the statutory model for the Indiana city attorney would remove the potential conflicts of interest facing the city attorney by freeing him from the ambiguities of his position within municipal government and allowing him to freely assume a partisan position on behalf of the mayor. While the statutes may be read to assign the city attorney this freedom, the ethical standards of the legal profession must also be considered.

### THE ETHICAL DILEMMA

The Code of Professional Responsibility, embodying the ethical duties of the attorney,<sup>32</sup> is concerned not only with the fair operation of the legal system, but also with the *appearance* of fair operation.<sup>33</sup> Since an attorney is both a public representative of the legal system and an officer of the court,<sup>34</sup> his actions must comport with standards of apparent as well as actual fairness. Thus, the city attorney who feels that he has resolved to his own satisfaction any ethical problems raised by his position must nevertheless ask what impression his actions create in the public mind.<sup>35</sup>

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attorney's personal obligations must control over his duty to his client. This solution is necessary to the integrity of the legal system—the attorney's obligations as an officer of that system prevent him from furthering illegal actions, even when these actions are undertaken by a client. While the attorney serves the client, he is not permitted to serve him at the expense of his own ethical obligations.

<sup>32</sup>The Code of Professional Responsibility, adopted by the House of Delegates of the American Bar Association on August 12, 1969, became effective as the ethical guide for ABA members on January 1, 1970. On March 8, 1971, the Indiana Supreme Court adopted Admission and Disciplinary Rule 23, which provides that:

Grounds for discipline and disciplinary action shall be conduct that violates the Code of Professional Responsibility . . . heretofore adopted by this Court as well as the standards or rules of legal and judicial ethics or professional responsibility adopted from time to time by this Court.

*Id.*

As the Preliminary Statement of the Code explains:

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived. The Ethical Considerations are inspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

*Preliminary Statement, ABA CODE OF PROFESSIONAL RESPONSIBILITY.*

<sup>33</sup>See ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 9.

<sup>34</sup>*Id.* at Canons 7 and 9.

<sup>35</sup>The problem of the apparent fairness of the legal system occurs frequently, particularly in situations in which the attorney finds himself, as the city attorney often does, playing multiple roles. It is difficult for the attorney to maintain even the appearance of the impartial decisionmaker.

The Code of Professional Responsibility admonishes the attorney that in representing a "corporation or similar entity," he owes his loyalty to the entity as a whole, and should not be influenced by "the personal desires of any person or organization."<sup>36</sup> An unbending adherence to this directive might require the city attorney to transcend the political realities of his role as a mayor's appointee and to serve as impartial counsel to all branches of city government. A narrow construction of the Code on this point, however, might avoid troubling ethical difficulties.

A municipal corporation, unlike its nonpolitical counterpart, is not generally expected to be composed of divisions which share a common sense of direction and which are governed by a single set of overriding policy decisions. Rather, the branches of a municipal corporation can be expected to experience frequent clashes over policy;<sup>37</sup> out of that conflict, our political faith asserts, comes the democratic choice.<sup>38</sup>

It is therefore unlikely that an attorney could accurately predict the "best interests" of the municipality. Even were a city attorney to make such an attempt, his political ties to the mayor's office<sup>39</sup> would render his position suspect in the public eye. The public may easily doubt the integrity of a legal system in which there appears to be such a chasm between theory and practice.<sup>40</sup> Although the mere fact that such a chasm exists does not demand a reinterpretation of ethical standards, such a

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The court in *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), commenting upon the actions of a commissioner who had made public statements about a matter pending before the Commission, wrote:

Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.

*Id.* at 590.

See, e.g., *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966); *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965); *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959). See also K. DAVIS, *ADMINISTRATIVE LAW* Text §§ 12.01-.02 (1972); Rogge, *An Overview of Administrative Due Process, Parts I & II*, 19 VILL. L. REV. 1, 197 (1973); Simon, *Administrative Procedure*, 43 WIS. B. BULL. 42 (Feb. 1970); Comment, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216 (1964); Comment, *Procedural Due Process and the Separation of Functions in State Occupational Licensing Agencies*, 1974 WIS. L. REV. 833; 48 TEXAS L. REV. 1385 (1970).

<sup>36</sup>ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18.

<sup>37</sup>See Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. BAR J. 331 (1974) for a discussion of difficulties faced by government counsel (there in the context of the federal government).

<sup>38</sup>See generally D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951).

<sup>39</sup>See notes 6-13 *supra* & text accompanying.

<sup>40</sup>ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 warns the public officer against involvement in situations in which his "personal or professional interests" may conflict with his official duties. The city attorney who is closely tied to the mayor, while statutorily-charged with a duty to all, may appreciate the difficulties warned against.

reinterpretation seems warranted where it must always *appear* to the public that the ethical standard cannot be met.

It is apparent that in this respect the Code of Professional Responsibility must be narrowly construed.<sup>41</sup> The call to represent the entity, while it may be mandatory in other circumstances, here merely operates to sow confusion in the mind of the attorney and the public.<sup>42</sup> If the Code is interpreted to mean that the city attorney represents the city *executive* as an entity, such confusion is avoided. The public will understand the attorney's responsibilities to the executive and the mayor far more easily than it will understand the city attorney's supposed role as the brooding omnipresence of city government. Practical safeguards here will far more effectively protect the legal system than will a broad appeal to the conscience.

### CONCLUSION

This note has explored the difficulties which inhere in the present function of the Indiana city attorney's office. The "globalist" conception of that office, which requires the city attorney to serve, insofar as he can, all branches of the city government, has given rise to ethical problems. Within the structure of municipal government, in addition, there are dysfunctions which may result from such an expansive view of the attorney's role.

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<sup>41</sup>See Teschner, *Lawyer Morality*, 38 GEO. WASH. L. REV. 789 (1970): "Probably the most troublesome feature of any code of professional conduct is that it consists of general, fictional propositions which are intended to be applied to particular, factual situations." *Id.* at 794.

<sup>42</sup>The conflicts of interest and ethical problems inherent in the current statutory role of the city attorney were brought into sharper focus during litigation surrounding the procedures for disciplining Indiana city police and firemen. See *City of Mishawaka v. Stewart*, — Ind. —, 310 N.E.2d 65 (1974), *superseding* *City of Mishawaka*, — Ind. App. —, 291 N.E.2d 900 (1973); *City of Gary v. Gause*, — Ind. App. —, 317 N.E.2d 887 (1974); *Guido v. City of Marion*, — Ind. App. —, 280 N.E.2d 81 (1972). A disciplinary hearing procedure (IND. CODE § 18-1-11-3 (Burns 1974)) was established to eradicate the spoils system under which a newly elected mayor could arbitrarily dismiss police and fire officers. See *State ex rel. Felthoff v. Richards*, 203 Ind. 637, 641-44, 180 N.E.2d 596, 598 (1932).

By statute, the city attorney may sit on the Board of Public Works and Safety, which decides the innocence or guilt of the officer. See IND. CODE §§ 18-2-1-4.2(b); 18-2-1-4.4; 18-2-1-5; 18-2-1-6 (Burns 1974). Another statute provides that the city attorney should also prosecute the case. IND. CODE § 18-1-6-13 (Burns 1974). In *City of Mishawaka v. Stewart*, the Indiana Supreme Court found this dual judge-advocate participation by the city attorney to be a denial of due process. The court also viewed the arrangement as a violation of Canon 9 of the Code of Professional Responsibility, which counsels attorneys to avoid even the appearance of impropriety.

Although the narrow holding of the case is only that the city attorney may not play both roles, the *Stewart* court strongly intimated that the city attorney's proper role is that of advocate.

This note suggests that municipal government would be better served by a reinterpretation of the city attorney's statutory and ethical duty. Assigning him a role as representative of the city executive would be far more consistent with the realities of Indiana municipal government, and would free the attorney from the dilemmas posed by his present ambiguous posture.

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